Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Petition for Expedited Declaratory Ruling of bebe stores, inc. To: The Commission	CG Docket No. 02-278

REPLY COMMENTS OF BEBE STORES, INC.

bebe stores, inc.

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In their Opposition to bebe stores, inc.'s Petition For Retroactive Waiver filed on January 6, 2017 ("Opposition"), Melita Meyer, Samantha Rodriguez and Courtney Barrett (collectively referred to as "Plaintiffs") mischaracterize bebe stores, inc.'s ("bebe") position in its Petition and in the pending litigation, and the posture of the pending litigation. No other oppositions to this Petition were filed. Contrary to what Plaintiffs contend, bebe filed its Petition because it believes that, based upon the facts it has presented regarding its loyalty-based marketing program ("clubbebe"), bebe is eligible for a limited, retroactive waiver of the FCC's new consent rules for Ms. Barrett and others similarly situated in light of confusion about the new rules.

Such a waiver would be consistent with the FCC's grant of similar waivers in In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Wavier and/or Retroactive Waiver of 47 C.F.R. Section 64.1200(a)(2) Regarding the Commission's Prior Express Written Consent Requirement, Order, CG Docket No. 02-278 (October 14, 2016) ("2016 Declaratory Ruling") and In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling And Order (July 10, 2015), ¶¶ 149-51 ("2015 Declaratory Ruling"). As bebe understands it, the waiver would be retroactive from October 16, 2013, to release of the 2015 Declaratory Ruling, and then from the release of the 2015 Declaratory Ruling through a period of 89 days.

I. MS. BARRETT AND OTHER SIMILARLY SITUATED INDIVIDUALS PROVIDED THE REQUISITE CONSENT TO BEING CALLED BY BEBE PRIOR TO OCTOBER 16, 2013 WHEN THEY ENROLLED IN CLUBBEBE, CONTINUED THEIR CLUBBEBE MEMBERSHIP AND ENJOYED THE BENEFITS OF CLUBBEBE

Plaintiffs argue that bebe is seeking a far broader waiver than the ones previously granted and, in particular, the one granted to Mammoth Mountain Ski Area, LLC ("Mammoth"). Id. p. 5. Plaintiffs' argument is premised on their theory that the waiver bebe has requested would encompass not only phone numbers obtained through bebe.com but also those collected by bebe at its point of sale ("POS"). Id. Plaintiffs reason that a phone number collected at the POS "does not involve a writing" and "[t]his, by definition, is not written consent, let alone written consent

that complies with the Commission's regulations." Id. In making this argument, Plaintiffs disregard that bebe's Petition is premised on its collection of certain of its customers' written consent through its clubbebe.

As explained in bebe's Petition, Plaintiff Courtney Barrett is a member of bebe's clubbebe and has been since October 29, 2010. By enrolling in clubbebe, Ms. Barrett and other similarly situated individuals agreed to be bound by the full clubbebe Terms & Conditions.[1] These written Terms & Conditions confirm that clubbebe members "consent to the use of the [their] personal information…for marketing and promotional purposes unless the member has opted out, and…consent[] to the receipt of information provided by bebe." The Terms & Conditions further state "You also agree to review these Terms and Conditions periodically and shall be bound by any modifications. If you do not accept these Terms and Conditions, or any subsequent modifications, your sole and exclusive remedy is to terminate your membership in the program." Thus, when Ms. Barrett and others voluntarily enrolled in clubbebe, among other things, they consented to bebe communicating with them using the information that they voluntarily provided, including consenting to being "called" by bebe at any telephone number provided.

Ms. Barrett enrolled in clubbebe at a bebe store[2] and, as part of her enrollment, she received a plastic membership card embossed with her unique clubbebe number along with a pamphlet that included the written clubbebe Terms & Conditions. Enrollment in clubbebe is voluntary; no purchase is required and the customer is not required to provide a mobile telephone number. As part of her enrollment, Ms. Barrett provided her name, mailing address, email address and a telephone number; Ms. Barrett, in fact, provided her mobile telephone number, which was captured in the home telephone number field in bebe's database. Like other clubbebe

[1] The clubbebe Terms & Conditions are available at https://www.bebe.com/custserv/custserv.jsp?pageName=RewardsConditions.

[2] Customers can also enroll in clubbebe in a bebe store, on bebe.com, on bebe's mobile application, or through bebe's customer service line.

members, on the same day that she enrolled in clubbebe, Ms. Barrett made a purchase and received clubbebe rewards points for her purchase, as contemplated by the clubbebe Terms & Conditions. She has since made two purchases associated with her clubbebe membership number, including one on December 12, 2013, and earned points on those purchases.

Clubbebe members can update their information in their membership profile, which Ms. Barrett did, and change their preferences for how they want to be communicated with by bebe, including by direct mail, email and/or text messages ("Preferences"), which Ms. Barrett also did. By updating their Preferences, they can opt into and out of receiving communications from bebe at any time. In addition to being able to update their clubbebe profile and Preferences in-store, they can easily call customer service or log into her member account profile on bebe.com to update their information, check their clubbebe points or browse the "clubbebe lounge."

By their participation in clubbebe, including, but not limited to, completing purchases by signing the receipts which reflected her clubbebe membership number, earning clubbebe points, receiving other clubbebe benefits and declining to remove their mobile telephone number from their profile or change their Preferences, Ms. Barrett and other clubbebe members manifested their assent to be bound by the written clubbebe Terms & Conditions. This included their consent to be called by bebe at the number they provided.

With regard to Ms. Barrett, on December 12, 2013, after viewing bebe's marketing materials and/or speaking with a bebe stylist about bebe's text messaging program ("bebe Texts"), Ms. Barrett confirmed that bebe could include her mobile telephone number in the mobile telephone number field in bebe's database. bebe's stylists were trained to explain to customers that enrollment in bebe Texts is voluntary and that the customer would receive a single, administrative text message confirming the features and benefits of bebe Texts described by the bebe marketing and stylist ("Opt-in Text").[3] Accordingly, Ms. Barrett and others who enrolled in bebe Texts understood that, by voluntarily agreeing to bebe including their mobile

[3] Customers were required to complete their enrollment by sending a response "Yes" text message to bebe ("Opt-in Response").

telephone number in the mobile telephone number field, they were initiating their enrollment in bebe Texts and, moreover, they were consenting to receive an Opt-in Text. Notwithstanding its Petition, bebe continues to believe that the Opt-in Text only required prior express consent because it simply confirmed what the bebe marketing and stylist told Ms. Barrett and other clubbebe members about bebe Texts and served exclusively an administrative purpose.

Once a mobile telephone number was saved in the mobile telephone number field, the number would have been forwarded to bebe's vendor and, as bebe understands it, the vendor, after confirming that the number was a mobile telephone number, would forward an Opt-in Text to the carrier for delivery to the number if it was in service and otherwise capable of receiving a text message. Because bebe's vendor filed for bankruptcy protection in 2013, bebe is unable to confirm whether Ms. Barrett or anyone else received an Opt-in Text.

Ms. Barrett was first identified as a plaintiff in the First Amended Consolidated Complaint for Damages and Injunctive Relief Pursuant to the Telephone Consumer Protection Act, 47 U.S.C. §§ 227 et seq. filed on October 21, 2016; Ms. Meyer's complaint was filed on January 17, 2014 and Ms. Rodriguez's complaint was filed on April 29, 2014, and these actions were consolidated and a consolidated complaint was filed on June 15, 2015. Ms. Barret confirmed that she is a clubbebe member but alleged "upon information and belief" that she received an Opt-in Text, confirming that she does not recall receiving an Opt-in Text. Like Ms. Barrett, Ms. Meyer and Ms. Rodriguez appear to be motivated to participate in the class action by the TCPA statutory penalties.

Plaintiffs identified Ms. Barrett as the representative for this subclass[4]

> **Post-October 16, 2013 Club Bebe Class**
> All persons within the United States who provided their mobile telephone number to bebe in one of bebe's stores at the point-of-sale and were sent an SMS or text message from bebe during the period of time beginning

[4] Contrary to Plaintiffs' characterization of the litigation, the Court provisionally granted class certification of a clubbebe subclass and, if a proper representative is not timely identified, the Court will decertify this subclass. Id., p. 1.

> October 16, 2013 and continuing until the date the Class is certified, who were not members of Club bebe during the Class Period.

Upon receipt of the October 21, 2016 complaint, bebe immediately initiated an internal investigation regarding Ms. Barrett and discovered that she provided her mobile telephone number to bebe in connection with her enrollment in clubbebe in 2010 and, as alleged, may have received an Opt-in Text in December of 2013. bebe's Petition followed.

II. PLAINTIFFS ERRONEOUSLY ARGUE THAT THE FCC ERRED WHEN IT GRANTED LIMITED, RETROACTIVE WAIVERS TO OTHER PETITIONERS[5] AND, FOR THIS REASON, BEBE'S PETITION SHOULD BE DENIED

Plaintiffs argue that that the FCC wrongly decided earlier petitions seeking limited, retroactive waivers of the FCC's new consent rules and that bebe should not be able to rely on those decisions. In particular, Plaintiffs suggest that the Mammoth waiver "has not served judicial economy, has not eased the district court's dockets, has not simplified matters for Mammoth or any other corporation that alleges confusion about the prior-express-written-consent rules, and has not otherwise served the public interest." For these reasons, they contend that the FCC should deny bebe's Petition for the limited, retroactive waiver. This argument is self-serving and unsubstantiated, and no doubt Plaintiffs' attorneys are making this argument because class actions premised on alleged violations of the TCPA are a very lucrative cottage industry for the Plaintiffs' bar and these waivers pose a threat to a potential stream of revenue for these attorneys.

The premise for Plaintiffs' argument is what appear to be inconsistencies in Mammoth's positions in the Petition For Expedited Declaratory Ruling or Forbearance of Mammoth Mountain Ski Area, LLC's Petition, Mammoth Mountain Ski Area, LLC ("Mammoth Petition") and Mammoth's Motion to Stay filed in Story v. Mammoth Mountain Ski Area, LLC, No. 2:14-cv-024422-JAM-DAD (the "Mammoth Motion"). The Mammoth Petition states that "[b]y using the Mammoth website, users are subject to a Privacy Policy in which the user 'agrees to be bound by all of [the] terms and conditions' of the website Privacy Policy, and the Policy explains

[5] See 2015 Declaratory Ruling, ¶¶ 149-51 ; see, generally, 2016 Declaratory Ruling.

that '[i]f you do not agree to these terms, please do not access or use this site.'" Id., p. 2. Mammoth's privacy policy allegedly contemplated that these individuals may be required to provide their telephone number and explained "that Mammoth can use a guest's telephone number to 'offer you specially tailored deals,' to 'fill orders, improve our marketing and promotional efforts, . . . improve our product and service offerings, . . . [and] to deliver information to you and to contact you regarding administrative notices.'" Id., p. 2.

In contrast, the Court's May 12, 2015 order on the Mammoth Motion states that "Defendant contends 'prior express consent,' as interpreted prior to the 2013 rule change, was given by Plaintiff, not through the privacy policy on [Mammoth's] website, but through his provision of his phone number to [Mammoth]." Id., p. 6 (citing Mammoth's reply brief). Although it granted the Mammoth Motion, the court noted that "[a]s an initial matter, the Court does not find support for the proposition that Plaintiff's provision of his phone number to [Mammoth] constituted written consent." Id., p. 8.[6] No further action has been taken by the Story court as of the date of bebe's submission of this Reply Comment. Accordingly, Plaintiffs' theory is merely speculation about Mammoth's position in the litigation and in its Petition.

Regardless, as noted in Plaintiffs' Opposition, the FCC confirmed in its 2016 Declaratory Ruling

> We emphasize, however, that the waivers granted here only apply to calls for which some form of *written* consent had previously been obtained. Nothing in the Commission's 2015 decision suggested that parties could reasonably have been confused about the requirement that the consent in question had to be *written*, and the Commission was specific in that regard.

Id., ¶ 15. The FCC's statement undermines Plaintiffs' entire argument.

III. BEBE'S PETITION DOES NOT THEORIZE THAT THE MERE PROVISION OF A PHONE NUMBER IN A BEBE STORE CONSTITUTES WRITTEN CONSENT

Plaintiffs argue that 1) bebe's Petition "nebulously suggests—without ever fully articulating its argument—that the mere provision of phone numbers constituted written consent"

[6] Plaintiffs appear to concede that Mammoth obtained the requisite prior express written consent because the numbers collected on its website "were ostensibly written in nature." Id., pp. 6-7.

(id., p. 4) and 2) bebe's Petition seeks a waiver that "far exceeds the scope of the waiver granted" to Mammoth because it would also cover a phone number collected in a bebe store at the point of sale. (id., pp. 5-8). Plaintiffs are wrong, as evidenced by bebe's Petition.

As explained in its Petition and above, the written clubbebe Terms & Conditions expressly provide that, by enrolling in clubbebe and maintaining their clubbebe membership, bebe customers agree to be bound by the full clubbebe Terms & Conditions. The Terms & Conditions confirm each clubbebe member's "consent" to bebe's use of the clubbebe member's "personal information… for marketing and promotional purposes unless the member has opted out" and to the clubbebe member's "receipt of information provided by bebe." In short, clubbebe members that provided bebe with their mobile telephone number expressly consented to bebe calling them at any number provided, as confirmed by the written clubbebe Terms & Conditions.

Plaintiffs make a second erroneous argument that bebe does not qualify for a waiver because its Terms & Conditions do not meet the "stringent set of requirements for written consent" citing 47 U.S.C. § 64.1200(f)(8). Plaintiff ignores that the FCC granted the limited, retroactive waivers acknowledging the "the 'uncertainty' of the Commission's 2012 language, the 'confusion' resulting therefrom, and the conclusion that it was 'reasonable to recognize a limited period within which [petitioners there] could be expected to obtain the prior express written consent required by our recently effective rule" (i.e., 47 U.S.C. § 64.1200(f)(8)). Under Plaintiffs' erroneous theory, bebe would be required to establish that it had complied with 47 U.S.C. § 64.1200(f)(8) in order to qualify for a limited, retroactive waiver of any obligation to comply with 47 U.S.C. § 64.1200(f)(8). Plaintiffs otherwise blatantly ignore that, in its Petition,

> bebe seeks an order granting bebe a limited, retroactive waiver of Section 64.1200(a)(2) of the Commission's Rules for these clubbebe members in light of confusion about amendments to the Commission's Rules and consistent with the Commission's grant of similar waivers of in its 2015 Declaratory Ruling and 2016 Declaratory Ruling.

Id., p. 10 (emphasis added). For clubbebe members who provided written consent to bebe before October 16, 2013, with a limited, retroactive waiver from the FCC, bebe had obtained the requisite written consent to call those individuals by sending them an Opt-in Text from October

16, 2013 to October 7, 2015 regardless of whether or not they provided their mobile telephone number to bebe online or in a bebe store.

IV. THE COURT'S ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION CONFIRMS BEBE'S ARGUMENT THAT THE CLUBBEBE TERMS & CONDITIONS ARE RELEVANT TO THE ISSUE OF CONSENT

Plaintiffs falsely claim that "bebe has not offered any evidence that it previously obtained written consent." Id., p. 4. In doing so, they blatantly ignore the Court's ruling on their class certification motion. In its order, the Court quotes the Terms & Conditions and otherwise concludes

> By virtue of that membership, bebe argues that these customers consented in writing to receive the text messages at issue here.
>
> Whatever the merits of this Club bebe consent argument, it appears to be subject to common proof since the terms of the Club bebe agreement are not represented to have varied in any material way. Thus, whether or not membership in Club bebe constitutes consent is a common question that can be answered on a classwide basis. The Court finds it appropriate, however, to create a subclass of each of the proposed classes composed of putative class members who were members of Club bebe during the relevant Class Period.

Id. (Dkt. No. 106), p. 9. The Court then (provisionally) certified two subclasses 1) a Post-October 16, 2013 Non-Club Bebe Class and 2) a Post-October 16, 2013 Club Bebe Class. Id., pp. 18-19. Thus, Plaintiffs' argument is transparently false.

V. THAT BEBE IS INVOLVED IN TCPA LITIGATION IS NOT A GROUND FOR DENIAL OF ITS PETITION FOR A LIMITED, RETROACTIVE WAIVER, AS THE FCC HAS ALREADY CONFIRMED

Plaintiffs argue that the Petition should be denied because they sued before the Petition was filed and bebe is attempting "to evade" its theoretical liability under the TCPA. Id., p. 7. In both the 2015 Declaratory Ruling and 2016 Declaratory Ruling, the FCC was aware that certain petitioners were involved in litigation. It noted in the 2016 Declaratory Ruling

> [T]he Commission, in granting the waiver relief it provided in 2015, did acknowledge [National Association of Broadcasters'] argument at the time that granting limited prospective relief would have a bearing on such litigation.

Responding to this argument, it reasoned

> But the essential basis for the relief provided under our rules was the 'uncertainty' of the Commission's 2012 language, the 'confusion' resulting therefrom, and the conclusion that it was 'reasonable to recognize a limited period within which [petitioners there] could be expected to obtain the prior express written consent required by our recently effective rule.'

Id., p. 9. Accordingly, the FCC has already concluded that pending litigation is not a ground for denying a request for a limited, retroactive waiver.

VI. CONCLUSION

Each of Plaintiffs' arguments is erroneous and otherwise self-serving, and bebe's Petition should be granted.

Respectfully submitted,

bebe stores, inc.

By: /s/ Glenn S. Richards

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